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No. 95-1853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM JEFFERSON CLINTON,

Petitioner,

v.

PAULA CORBIN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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Brief Amicus Curiae of Law Professors In Support of Petitioner

Interests of Amici Curiae

The law professors named below teach and write about constitutional law. This brief sets forth their considered view from a scholarly perspective on the issue central to this case: whether the office of the Presidency should be presumptively protected from the distraction and diversion of energy caused by the pursuit of civil litigation against the President during his term of office. This brief does not speak to any other issue in this case

nor does it in any way address the merits of respondent's complaint. Amici join this brief solely on their own behalf and not as representatives of their universities.

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Counsel for both parties have consented to the filing of this brief; their stipulation to that effect has been lodged with the Court.

SUMMARY OF ARGUMENT

This case presents a narrow issue: whether "our constitutional heritage and structure," *Nixon v. Fitzgerald*, 457 U.S. 457 U.S. 731, 748 (1982), calls for a temporary delay of civil litigation against a sitting President when the cause of action arises out of alleged acts done in his non-presidential capacity well before he ever took office and the plaintiff cannot show a compelling exigency that requires the litigation to proceed immediately. This case does not raise any question of permanent immunity for non-official acts. The only question is whether the proceedings should be temporarily delayed.

Amici respectfully submit that such a delay is appropriate. A limited and temporary immunity from suit for unofficial acts is fairly implied in the structure of the executive branch established in Article II of the Constitution and in traditional principles of separation of powers. The solitary nature of the Presidency necessitates that the person occupying that office be free from the diversion of energy and distraction from duty that defending such a private damages action would cause. *See Fitzgerald*, 457 U.S. at 753. Furthermore, such temporary immunity is consistent with a long tradition of judicial avoidance of incursions upon the Presidency. Where, as here, the actions alleged long predated accession to the Presidency, and where, as here, there has been no showing of exigent need for immediate relief, there is no reason to override the structural considerations warranting temporary immunity.

ARGUMENT

This case presents the question whether a private civil action for damages, stemming from alleged actions predating and outside the Presidency, should be temporarily delayed during the President's tenure in office. Amici argue that it should be, so long as the plaintiff can show no compelling need for immediate relief.

At the outset, it is important to note the very narrow question before the Court. This case does not raise a claim of immunity from liability. As to the scope of presidential immunity from damages, this Court's decision in *Nixon v. Fitzgerald* inferred from Article II and the separation of powers an absolute Presidential immunity "from damages liability predicated on his official acts." 457 U.S. at 749. But this case involves solely non-official acts, and there is no claim that the presidency shields petitioner from liability on respondent's claims.

Additionally, this case raises no claim of permanent immunity for non-official acts. The President is not above the law, *see, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."), and no one claims that he is. The only issue here is whether constitutional structure and separation-of-powers principles call for a *temporary* postponement of civil litigation until after the President leaves office. Everyone agrees that the action can proceed at that time.

Finally, this case does not raise the question whether exceptional exigent circumstances, as demonstrated in a court of law, might justify allowing a civil action to

proceed against the President even during his term in office. It may be that discovery or other proceedings should be allowed to go forward if there is a compelling need for immediate relief. No such need has been shown here. Thus, the only question presented here is whether a private plaintiff, with no special showing, can compel a sitting President to defend a civil action against him during his term in office. Amici respectfully suggest that the answer to that question should be "no."

I. TEMPORARY PRESIDENTIAL IMMUNITY FROM PRIVATE SUITS IS FAIRLY IMPLIED IN ARTICLE II AND IN TRADITIONAL PRINCIPLES OF SEPARATION OF POWERS

The Constitution nowhere specifies what immunities a sitting President should enjoy, but this Court has long recognized that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." *Nixon v. Fitzgerald*, 457 U.S. at 750 n.31; *see also United States v. Nixon*, 418 U.S. at 705-06 n.16 (noting that "the silence of the Constitution [on executive privilege and immunity] is not dispositive"). The Court has inferred presidential privileges and immunities from the unique position of the President set forth in Article II of the Constitution and from the fundamental structural principle of the separation of powers.

Nixon v. Fitzgerald illustrates the Court's method. In *Fitzgerald*, the Court looked to "history and policy" as well as to constitutional text and structure. 457 U.S. at 748. In concluding that the President was entitled to absolute immunity from civil damages for official acts,

the Court stated that "[w]e consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749. The Court reasoned in part from the functional necessities of the President's unique responsibilities under Article II, and in part from the principle that no branch should be subject to crippling incursions by another branch. This sort of structural reasoning has a venerable pedigree in our constitutional law. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see generally* Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969). Such structural reasoning is especially relevant to the issue of temporary immunity.

A. Presidential Duties Under Article II

"The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. at 749. Article II, § 1 of the Constitution vests the entire "executive Power" in the President. No other branch of government is entrusted to a single person. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. The President is Commander in Chief, and he alone is charged with the appointment power, the treaty power, and the duty to "take Care that the Laws be faithfully executed." Article II, §§ 2 & 3. The President is the only officer in the government so vital that the mechanism for his or her succession is constitutionally prescribed, even in the

event of his or her temporary incapacity. U.S. Constitution, Amend. XXV, §§ 3-4.

As two commentators recently described the President's unique position:

> Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed.

Akhil Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev 701, 713 (1995).

At least since *McCulloch v. Maryland*, it has been well established that "'that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant.'" *United States v. Nixon*, 418 U.S. at 706 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)). In other words, "[c]ertain powers and privileges flow from the nature of enumerated powers ...." *Id.* at 705. Accordingly, Justice Joseph Story long ago concluded that the grant of executive power in Article II "necessarily" carried with it some privileges and immunities essential to make the office function:

> There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them.... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 J. Story, *Commentaries on the Constitution of the United States* § 1563, pp.418-19 (1st ed. 1833), cited with approval in *Nixon v. Fitzgerald*, 731 U.S. at 749.

Following Justice Story, the Court in *Fitzgerald* fashioned an immunity to enable the President to "discharge the duties of his office." Specifically, the Court recognized an absolute and permanent immunity from civil liability for official acts. This immunity applies even if a President maliciously abuses his or her official powers and continues even after he or she has left office. Obviously, this is strong medicine. The absolute and permanent protection of the President is accomplished at the cost of an absolute and permanent sacrifice of the plaintiff's interest. This extraordinary result was justified by twin rationales.

One rationale was the need to avoid inhibiting Presidential decisionmaking. Because the threat of civil liability might render the President "unduly cautious," *id.* at 752 n.32, absolute immunity was granted to guarantee that the President had "'the maximum ability to deal

fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). Obviously, this rationale applies only to the President's official acts. It has no application to a claim of immunity from suit for acts committed outside the scope of office.

The other rationale, however, is directly applicable. The *Fitzgerald* Court recognized absolute immunity in order to prevent the distraction from duty that would ensue from *any* litigation against the President. "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. For the *Fitzgerald* Court this concern was made particularly acute by the risk that the President's "sheer prominence" would make him an "easily identifiable target" for civil suits. *Id.* at 752-753.

The *Fitzgerald* Court's concern to prevent diversion of energy and distraction from duty is, of course, fully implicated by suits for non-official acts. Here, as in *Fitzgerald*, permitting the lawsuit to go forward during the President's term of office would impair his ability to discharge his duties under Article II. "We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time ...." Amar & Katyal, *supra*, 108 Harv. L. Rev. at 713. And here, as in *Fitzgerald*, permitting the lawsuit to go forward would risk making the President a litigation magnet for an ever-proliferating variety of civil suits.

It is true, of course, that the *Fitzgerald* Court regarded both rationales as essential for the absolute and permanent immunity there granted. For that reason, absolute immunity was limited, as the Eighth Circuit repeatedly emphasized, to the President's official acts. That is as it should be. But it does not follow that *no* immunity is available for non-official acts. The *Fitzgerald* Court's concern to protect the "fearless and impartial" discharge of the President's duties may have been crucial in justifying an absolute and permanent immunity for official acts, but the equally important concern to prevent diversion of energy and distraction from duty is sufficient to justify a temporary stay of suits for non-official acts. As Justice Story put the point, it is the President's "*person*" and not merely his job that must be "deemed, in civil cases at least, to possess an official inviolability." Only if the President's "person" is undistracted and undiverted can he or she carry out the unique duties imposed by Article II.

Thus the structural reasoning of *Nixon v. Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct. As the Court observed in *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977) (citations omitted), "[t]o the extent that [presidential] privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege."

B. Separation of Powers

Nixon v. Fitzgerald also reasoned that the balance of power between the Executive and the Judiciary would be upset if the President could be targeted for civil damages during his term in office:

> Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege, we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution."

457 U.S. at 753 (quoting *United States v. Nixon*, 418 U.S. at 708, footnotes omitted). The separation of powers embodied in the Constitution counsels judicial deference to the Executive unless there are strong countervailing interests.

Nixon v. Fitzgerald also relied in part on historical evidence suggesting that "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31. President John Adams and Senator Oliver Ellsworth were reported by Senator Maclay to have said that "the President, personally, was not subject to any process whatever.... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Journal of William Maclay* 167

(E. Maclay ed. 1890), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

President Thomas Jefferson raised the separation-of-powers issue in his argument against being required to comply with a *subpoena duces tecum* in the treason trial of former Vice President Aaron Burr:

> The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other .... But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

10 *The Works of Thomas Jefferson* 404 n. (Paul L. Ford ed., 1905), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

As it happened, Chief Justice Marshall ruled that Burr's constitutional right to compulsory process overrode any executive privilege President Jefferson might have had. *United States v. Burr*, 25 Cas. 30, 33-34 (C.C.D. Va. 1807). Similarly, in *United States v. Nixon*, the Court held that the presumptive privilege of presidential confidentiality was overridden by a "demonstrated specific need for evidence in a pending criminal trial." 418 U.S. at 713. But neither Chief Justice Marshall in *Burr* nor the Court in *Nixon* suggested that such a balancing of interests was incompatible with a constitutional privilege grounded in the separation of powers.

Indeed, through the years, the courts have struggled to avoid the kind of impasse that might have developed had the *Burr* court sought to hold President Jefferson in contempt. When injunctive relief must issue against the executive branch, it has typically run against an executive official other than the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (enjoining the Secretary of Commerce); *Atlee v. Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972) (dismissing the President as party to suit in which the Secretary of Defense was also named as a party). Rather, the courts have an "apparently unbroken historical tradition" of refusing injunctive relief against the President himself. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia J., concurring in part and concurring in the judgment); *see id.* at 802 (plurality opinion). Courts that do maintain jurisdiction over the President as a party have resorted to declaratory rather than injunctive relief. *See, e.g., National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("We so restrict ourselves at this time in order to show the utmost respect to the office of the Presidency and to avoid, if at all possible, direct involvement by the Courts in the President's constitutional duty faithfully to execute the laws and any clash between the judicial and executive branches of the Government."). And even that limited assertion of judicial authority has been disputed. *See Franklin v. Massachusetts*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in judgment) ("I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.").

If such encroachment of the judiciary upon the Presidency should be avoided in matters of public affairs, it should also be avoided if at all possible in private lawsuits against the President as a private citizen. The tradition of judicial restraint and deference not only avoids intrusion of the judiciary upon the independence of the Presidency, but also avoids the friction of "needless head-on confrontations between district judges and the Chief Executive." *Franklin v. Massachusetts*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). That friction is similarly threatened in private lawsuits against the President, as the Chief Executive is inseparable from the person occupying the office.

C. Absence of a Compelling Countervailing Interest

Article II and the separation of powers thus support a temporary presidential immunity against lawsuits unconnected to official acts. But that is not to say that such immunity would necessarily be absolute. It may well be that the President's right to delay such litigation until after he or she left office could be qualified or overridden on a showing of a compelling need.

That issue need not be resolved in this case, as it is plain that no compelling need for immediate proceedings has been demonstrated here. A civil damage suit such as this one, by definition, involves only discrete, past harms that are reparable, if merit be found, by money damages. Delay in payment can be compensated

by prejudgment interest. A plaintiff might in some case be able to demonstrate an urgent need for injunctive relief against the President, in his personal capacity, to end an ongoing harm. Were a President to fail to abate a nuisance on his private property, for example, neighbors seeking injunctive relief might be able to show that the continuing nature of the nuisance would justify an immediate injunction. But the burden of demonstrating exigency should rest on the plaintiff. Otherwise the President would have to bear the burden of diversion of energy and distraction from duty in order to establish an immunity based on the need to avoid those costs. The only way for a temporary immunity to accomplish its purpose is to make the immunity presumptively applicable in all cases, with exceptions only in those unusual and, on this record, hypothetical circumstances in which there would be a compelling need for immediate relief. If the President's privilege were overcome here, it would be no privilege at all.

II. THE TEMPORARY IMMUNITY SHOULD EXTEND TO DISCOVERY AND OTHER PRETRIAL MATTERS

Unlike the Eighth Circuit, the district court recognized the need for a presumption in favor of temporary immunity but undercut its decision by permitting discovery to proceed. This approach defeats the very purpose of granting temporary immunity. The same functional and separation-of-powers concerns that counsel against subjecting a sitting President to trial likewise counsel against imposing on him the burden of discovery and other pretrial motions. Indeed, the problem is not

merely that discovery can be as burdensome as trial itself; discovery, by design, can be considerably *more* invasive, and can give the plaintiff considerable control over the time and energies of his or her opponent.

Discovery under the Federal Rules of Civil Procedure reaches far beyond admissible evidence. Discovery is not limited to issues raised by the pleadings or by the merits of the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Nor need the information sought through discovery be admissible at trial. Fed. R. Civ. P. 26(b)(1). Discovery is intended to be far-ranging "to allow a broad search for ... any ... matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26 advisory committee's note, 1946. Obviously, this intentionally broad nature of the discovery process directly and severely conflicts with the constitutional interest in an unencumbered Chief Executive.

CONCLUSION

It may be that delaying discovery and trial of civil actions based on non-official acts until the President has left office will work some hardship on some plaintiffs. The same is true of all immunities. Compared to the burden on those who complain of official misconduct, however, the burden is rather slight. Those who claim injury resulting from the President's official acts are absolutely and permanently barred from recovery, no matter how egregious the alleged misconduct. Those who claim only injury resulting from the President's non-

official acts are not comparably disadvantaged. At most, they are required to wait a few years until the President has left office or to shoulder the burden of demonstrating a compelling need to proceed at once. This hardship is unfortunate, but it is a necessary and inescapable feature of avoiding the "unique risks to the effective functioning of government" that would be posed by unrestricted civil actions against a sitting President.

Therefore, *amici* urge this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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